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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD A. DUNCAN, ET AL,

PETITIONERS

VS.

VILLAGE OF MIDDLEFIELD, OHIO

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

1. Whether to deny such writ would violate the Duncans' constitutional or other rights in that such would deprive them of any appellate courts review of the merits of their case, which was not decided until the Ohio Supreme Court analyzed and ruled on the evidence in the record of this case in relation to the factors of the "practical difficulty test"?

2. Whether the Duncans' constitutional protected right from being deprived of property without due process and other rights are violated when a state court of last resort ruled that no "practical difficulty" is present in the Duncans' area variance application due to the "outweighing community interests", and the evidence in the record indicates that; 1) such "community interests" are non-existant in that such were supported solely on a finding of "an alteration of the

essential nature of the neighborhood" based only upon unsubstantiated viewpoints of neighboring property owners, and 2) the court abused its judicial discretion by basing such ruling on (4) four findings which are insufficient to form a basis thereof, in that the rational setforth in support of such findings is comprised of misapplied laws and numerous evidentiary errors, and it counters existing law?

3. Whether the Duncans' constitutional protected right from being denied the equal protection of the law is violated when the Ohio Supreme Court previously ruled on a similar application for an area variance in Kisil v. Sandusky, and there is no rational basis setforth as to why such court did not; 1) subject that applicant to such disfavorable erroneous principles of the "practical difficulty test" as applied in the Duncans' case, or 2) make similar favorable findings in the Duncans' case as those in Kisil where

the supporting facts in the records of each case are nearly identical?

4. Whether the Duncans' massive amount of evidence as setforth in the record of this case clearly indicates that they overwhelmingly have favorably satisfied the factors of the "practical difficulty test" toward establishing their practical difficulty, therefore entitling them to their requested area variance?

For the reasons enunciated herein, the petitioners believe the answers to such questions must be yes.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

RICHARD A. DUNCAN, ET. AL.
Petitioner

vs.

VILLAGE OF MIDDLEFIELD, OHIO
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, the Duncans, hereby petition this honorable court for a writ of certiorari to review a judgement and opinion of the Ohio Supreme Court rendered in this cause on April 11, 1986, and respectfully shows:

OPINIONS BELOW

The Ohio Supreme Courts' opinion and judgement entry Duncan v. Middlefield (1986) 23 Ohio St. 3d 83 is attached as Appendix A1 and A33 (Rehearing entry is attached as Appendix A35, (July 16, 1986)).

The 11th Ohio District Court of Appeals' opinion (Jan. 3, 1985) is attached as Appendix A20.

The Court of Common Pleas', Geauga County, Ohio opinion and judgement entry (Feb. 22, 1984) is attached as Appendix A24.

The Middlefield Zoning Board of Appeals' (Ohio) resolution (Jan. 5, 1983) is attached as Appendix A28.

JURISDICTION OF THIS COURT

On April 11, 1986 the Ohio Supreme Court entered judgement reversing the 11th District Court of Appeals of Ohio. Such court allowed leave to file a motion for rehearing and denied such motion on July 16, 1986 (while such was pending a motion for a 30

day extension of time to file a writ of certiorari petition was granted until August 9, 1986). The statute conferring on this court jurisdiction to review such judgement by writ of certiorari is 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS/ORDINANCES INVOLVED

Amendment V; "Nor shall any person .... be deprived of life, liberty, or property, without due process of law..."

Amendment XIV; "... Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, Section 2; "In all the other Cases before mentioned the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Middlefield Zoning Ordinance 1133.06 is setforth at Appendix A36.

STATEMENT OF THE CASE

In September 1982, the Petitioners (hereinafter, the "Duncans") applied to the Village of Middlefield, Ohio for a building permit to construct (8) eight multi-family

residential units on their 1.03 acre property behind their existing duplex. Such lot was located in a R-3 High Denisty Residence Zone, which listed the proposed multi-family dwelling type as a permitted use and through its density provision allowed for a total of (11) eleven multi-family units to be built on the property due to the lots greater than 1 acre size. The proposal met all of the zoning requirements, except that the lot was less than 12 feet short of the 100 foot frontage requirement which was necessary to allow multi-family dwelling units on such lot.

Because of the slight narrowness in the physical configuration of this lot the permit was denied and the Duncans sought to "exhaust their administrative remedy" and were subsequently deprived of their otherwise permitted density and use of such property, when the Middlefield Village Zoning Board of Appeals (board) denied their variance request on the grounds that the application did not comply with the findings of their local

zoning law 1133.06 (In the boards' resolution, it did not setforth any reason in support of one of its findings which is in issue herein, that the grant of the variance would "alter the character of the neighborhood".)

In the proceedings before the board the Duncans setforth a two-hour presentation. Within such they argued that ordinance 1133.06 was not applicable to their instant "area variance" case, but that "lesser standards" apply, and that they need only to satisfy the requirements of the "balance test" for the granting of their "area variance" ("owners harm" from the denial of the variance outweighs the "communities harm" if it was granted).

Nevertheless, the Duncans setforth evidence which indicated that both this test and the requirements of ordinance 1133.06 were satisfied. The emphasis of this presentation was the Duncans' <u>two-part analysis</u>, which included testimony and (12) twelve

large exhibits (maps, photos, charts) setting forth 1) the land use characteristics and existing conditions (traffic, air and noise pollution), population counts and densities, etc., within 300 feet of the subject property and 2) an evaluation of the expected impact of the proposal on such elements (e.g. a traffic engineers' report estimated that 48 additional vehicular trips would be generated from such proposal in a 24 hour period).

The Duncans thus concluded from this analysis that no alteration would occur to the neighborhood if the variance was granted.

The Villages' evidence merely consisted of the testimony of (2) two board members and a few neighbors who commented on alleged existing population densities and closeness of lots in the area and the number of times the Duncans had previously sought variances on the property.

The Duncans reiterated their argument on appeal to the Court of Common Pleas, which in it's opinion affirmed the boards denial, merely

echoing (2) two of the boards earlier stated findings (again no "reasoning was setforth in support of the "alteration of the neighborhood" finding).

While the case was before the Court of Appeals, Ohios' Supreme Court setforth its ruling of Kisil v. Sandusky, 12 Ohio St. 3d 30 (hereafter, referred to as Kisil) which was the first Ohio case to enunciated upon a "lesser standard of proof" for area variances, "the practical difficulty test". Accordingly, the Duncans emphasized their "area variance" argument, indicating how the factors of such test, as related to the evidence in the record, warranted the granting of their variance (in addition to arguing the errors of the lower Court).

The Court of Appeals unanimously reversed the lower Courts ruling stating that it wrongly applied the "unnecessary hardship" use variance standards of ordinance 1133.06 to the Duncans' "area variance" case (implying that the practical difficulty test

applied). However, such Court failed to elaborate on the principles of such "Court made law" (policies articulated by Courts) or the evidence in the record in relation thereto and merely and ambiquously stated that the "Appellants contention as to the courts finding as to the preponderence of evidence is well taken in view of Kisil ruling".

The Village appealed such decision to the Ohio Supreme Court and the Duncans in a 86 page Brief argued extensively how each and every one of the factors of such practical difficulty test, as related to the evidence in the record, were favorable satisfied toward establishing their "practical difficulty". Subsequent to a 30 minute oral argument (both sides) the Court in its opinion agreed with the Court of Appeals correction of the body of law which was applicable, and it setforth (7) seven specific factors to be considered under such test in its syllabus. The court further noted the

relaxed type and extent of proof required for the granting of such type of variance, stating its overall function under such test at page 86 as follows;

> "In observing the spirit of an ordinance and attempting to do substantial justice, a zoning board of appeals or a reviewing court necessarily must weigh the competing interests of the property owner and the community."

(Note; this is almost exactly what the Duncans argued before the board to be the relevant issue herein, the "balance test".)

After apparently considering such factors in relation to the facts in the record (being the first court to do so), this court reversed the court of appeals and ruled at page 87 of its decision that no "practical difficulty" exists to warrant a variance, due to the outweighing effect of the "community interests".

The Courts' final paragraph of their opinion at page 88 setforth its ruling as follows;

> "Substantial justice requires that the interests of the community, neighborhood and adjoining property owners be given due consideration in this case. The record reveals that the interests of these groups would not be served by approval of the requested variance; and, denial of the variance did not deprive the Duncans of a reasonable return or beneficial use of their property.[3] A preponderance of reliable, probative and substantial evidence supports the board's denial of the requested variance. The judgment of the court of appeals must therefore be reversed."

Such Court, in failing to comment at all on any of the points as setforth within the Duncans' voluminous argument, specifically setforth (4) four findings in support of its ruling;

1) The Duncans could have made beneficial use of their property and received a reasonable return;
2) It cannot easily be determined from the record whether the requested variance was "substantial";
3) The variance would alter the essential nature of the neighborhood;
4) The Duncans' predicament could have been obviated through the construction of duplexes.

The federal questions presented in these proceedings are first raised at this stage because it was not until the Duncans were before the Ohio Supreme Court that they

received a ruling on the merits of the case, to wit, a ruling on the evidence in the record in relation to the applicable law determinative of their case, the "practical difficulty test". (the board and the Court of Common Pleas completely disregarded such test; while the Court of Appeals, though recognizing such application of such law, for whatever reason failed to rule or elaborate on the evidence in the record).

REASONS FOR GRANTING THE WRIT

1. TO DENY SUCH WRIT WOULD VIOLATE THE DUNCANS' CONSTITUTIONAL OR OTHER RIGHTS IN THAT SUCH WOULD DEPRIVE THEM OF ANY APPELLATE COURTS REVIEW OF THE MERITS OF THEIR CASE, WHICH WAS NOT DECIDED UNTIL THE OHIO SUPREME COURT ANALYZED AND RULED ON THE EVIDENCE IN THE RECORD OF THIS CASE IN RELATION TO THE FACTORS OF THE "PRACTICAL DIFFICULTY TEST".

The first reason necessitating the granting of such writ is to afford the Duncans an appellate review of their case. Surely, all judicial decisions on the merits of a case are entitled to be reviewed at least once to determine the fairness or justness as rendered in the opinion below. Without such a right to review any such court of last resort could decide a case in any flagrantly arbitrary and unreasonable manner, without any concern whatsoever of reversal.

As was noted earlier, it was not until this case was before the Ohio Supreme Court

that a ruling was rendered in regards to the factors of the "practical difficulty test". Certainly, the Duncans cannot be denied such a right of judicial appellate review now, when they strenuously argued at the onset of this case before the board and at every stage of the judicial proceedings, the inapplicability of zoning ordinance 1133.06 and that a "lesser standard" was applicable. It would be unjust to deny the Duncans an appellate review simply because the board and such courts were unfamiliar with the law of area variances and were unknowledgable as to how to apply the "practical difficulties test", until the Duncans reached the final step of the Ohio judicial system (emphasis added!).

2. THE DUNCANS' CONSTITUTIONAL PROTECTED RIGHT FROM BEING DEPRIVED OF PROPERTY WITHOUT DUE PROCESS AND OTHER RIGHTS ARE VIOLATED WHEN A STATE COURT OF LAST RESORT RULED THAT NO "PRACTICAL DIFFICULTY"

IS PRESENT IN THE DUNCANS' AREA VARIANCE APPLICATION DUE TO THE "OUTWEIGHING COMMUNITY INTERESTS", AND THE EVIDENCE IN THE RECORD INDICATES THAT; 1) SUCH "COMMUNITY INTERESTS" ARE NON-EXISTANT IN THAT SUCH WERE SUPPORTED SOLELY ON A FINDING OF "AN ALTERATION OF THE ESSENTIAL NATURE OF THE NEIGHBORHOOD" BASED ONLY UPON UNSUBSTANTIATED VIEWPOINTS OF NEIGHBORING PROPERTY OWNERS, AND 2) THE COURT ABUSED ITS DISCRETION BY BASING SUCH RULING ON (4) FOUR FINDINGS WHICH ARE INSUFFICIENT TO FORM A BASIS THEREOF, IN THAT THE RATIONAL SETFORTH IN SUPPORT OF SUCH FINDINGS IS COMPRISED OF MISAPPLIED LAWS AND NUMEROUS EVIDENTIARY ERRORS, AND IT COUNTERS EXISTING LAW.

The second reason necessitating the granting of such writ is to illustrate to this Court the inadequacies of the Ohio Supreme Courts' ruling that no "practical difficulties" exist to the Duncans due to the outweighing effect upon the "community inter-

ests" if the variance is granted over the "Duncans interest" if it is denied.

The specific errors as committed by this court under each of the (4) four findings setforth in support of its ruling will be argued below in detail, along with relevant portions of the evidence as setforth by the Duncans (and other points) in the courts below. Such discussion will clearly indicate that the evidence in the record of this case reveals that such ruling has no merit and violates specific due process requirements and other general rights (constitutes an abuse of judicial discretion) in that such (4) four findings are insufficient to support or provide no foundation or basis for such ruling.

FINDING - THE VARIANCE WOULD ALTER THE ESSENTIAL NATURE OF THE NEIGHBORHOOD.

The court at page 87 of its opinion stated its finding and supporting rational as follows;

> "Third, the record supports the boards finding that the variance would alter the essential nature of the neighborhood. Al-

> though there was some conflict as to what area constituted the Duncans' neighborhood it is clear that the properties immediately surrounding the Duncans' property consist mainly of one- and two-family dwellings. Adjoining property owners testified before the board in this case and in several hearings on previous variance applications that had been filed by the Duncans. These adjoining property owners uniformly opposed the requested variances on the grounds that their properties would be detrimentally affected by the proximity of the proposed multi-family dwellings to their own dwellings."

(Note; a scrutiny of the Courts' opinion indicates that it is based solely upon this finding that the Ohio Supreme Court arrived at its determination as to the weight of the "community interests" which would be affected by the Duncans' variance grant).

As can be seen herein in its finding, this court makes the first attempt in these proceedings to justify or to, "breath life into", the boards' and Common Pleas Courts' unreasoned finding of such an alteration of the neighborhood, by weakly asserting, to wit; that such would occur because the properties immediately surrounding the Duncans' property consist mainly of one and two-family dwellings, and therefore, that these adjoining property owners (in such dwellings)

opposed the Duncans' project due to the "detrimental affect" of the proximity of such project to their dwellings.

Even assuming that such assertion is factually correct (however, as will be shown below it contains numerous errors) the main error is that it is based solely upon "unsubstantiated viewpoints of neighbors" (their properties would be"detrimentally affected") and therefore is insufficient to support such a finding as established by the law of this court.

The undisputed facts in the record clearly indicate that only (1) one neighbor, Anne Reed, setforth any mention at all in regards to "detrimental affects", and she merely setforth her opinion as follows;

> "she feels the lot is too narrow for that number of apartments that close together as all the houses there are very close together; questions if this will put a load on sewers".

(Note; any additional neighborhood opposition was setforth by Della Morrison who merely commented on alleged existing high density population in the area and by several other neighbors who setforth their opinion against the Duncans applying for a number of var-

iances).

However, this court recently in the case of Cleburne v. Cleburne Living Center (No 84-468), setforth the non-permissable bases or non-effect of private biases or neighbors' negative attitudes or fears unsubstantiated by factors which are properly cognizable in a zoning proceeding, at page 14 as follows;

> "The District Court found that the City Council's insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like....."Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, ___ U.S. ___,___(1984)."

This court similarly stated this point in the case of Eastlake v. Forest City Enterprises, 426 U.S. 668 at page 690 as follows;

> "As the Justices of the Ohio Supreme recognized, we are concerned with the fairness of a provision for determining the right to make a particular use of a par-

ticular parcel of land. In such cases, the state courts have frequently described the capricious character of a decision supported by majority sentiment rather than reference to articulable standards.[12]"

The footnote 12 stated as follows;

"[12]But in restricting individual rights by exercise of the police power neither a municipal corporation nor the state legislature itself can deprive an individual of property rights by a plebiscite of neighbors or for their benefit ...Benner v. Tribbitt, 190 Md. 6, 20, 57 A. 2d 346 353 (1948). The determination of a petition for a variance cannot be determined by a poll of the sentiment of the neighborhood. Town of Homecroft v. Macbeth, 238 Ind. 57 62 63, 148 N.E. 2d 563, 566 (1958). It is also not a proper exercise of such authority to base their decision (on a rezoning) merely on strenuous objections of residents of the Town' as (the Board) does in reason (3). Such remonstrances may be heard and taken into consideration but they may not be permitted to control the board's decision. Heffernan v. Zoning Board, 50 R.I. 26, 144 A. 674. A poll of the neighborhood to weigh the conflicting wishes of the residents or landowners in the vicinity is not the purpose of the hearing. Kent v. Zoning Board of Town of Barrington, 74 R.I. 89, 92, 58 A. 2d 623, 624 (1948). Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.(Emphasis added). Udell v. Haas, 21 N.Y. 2d 463, 469, 235 N.E. 2d 897, 900-901 (1968)."

Consequently, in view of this law, these limited neighbors viewpoints in the record in regards to "that the lot is too narrow" or that the Duncans "have applied for too many variances" etc, are unsubstantiated by factors which are properly cognizable in a zoning proceeding and merely consist of opinions by a plebiscite of neighbors strictly for their benefit. Therefore, such cannot deprive the Duncans of property rights, by constituting a poll of the sentiment of the neighborhood, upon which the board and courts weighed their conflicting wishes and based their decision (the lack of supporting evidence for this finding in the whole record will be elaborated on below).

(Note; The Duncans' similarly setforth the inadequacies of such "negative attitudes" in their Brief before the Ohio Supreme Court, in which it was argued that such "bare assertions of adverse effects upon neighbors" (Young v. Board of Zoning Appeals, 307 NYS 2d 895 (1970), are insufficient and amount to only "meager evidence" (McClean v. Sorley, 310 A 2d 783)).

The decision by the board based solely on such "neighbors viewpoints", violates the

requirements of due process, as is stated in Schnidmans' treatise, Handling the Land Use Case (Little Brown, 1985) at page 205 as follows;

> "A plebiscite of the neighborhood does not determine zoning. In words to this effect, courts throughout the land have for many years repeated one of the great myths of American land use regulation. Due process requires that zoning decisions-at least in local, as opposed to comprehensive map-amendment cases-be made in accordance with the evidence of record."

It is evident that such boards' decision violates law in that it has allowed "some portion of the community to invalidate" the Duncans' right to their permit (see Cleburne, supra) and allowed the neighbors to "withhold consent for selfish reasons or arbitrarily" and subjected the Duncans to their will or caprice (see Seattle Trust Co. v. Roberge, 278 U.S. 116 at 122).

Furthermore, this assertion as setforth by the Ohio Supreme Court is additionally insufficient to support its finding, in that it contains many obvious errors. It is misleading in that, on its face it appears that

many adjoining property owners, plus others, appeared at the Village Hall meetings on the Duncans' 10 unit proposal, with legitimately based complaints as to how their properties would be "detrimentally affected" by the proximity of such proposal.

However, the first error occurs in that it is undisputed that no adjoining property owners testified on the record as to any "detrimental effects" (only Anne Reed did so, whose property was (3) three lots south of the Duncans' property!)

Secondly, such assertion is flagrantly erroneous in that it explicitly reveals that it is at least partially based on opinions or testimony of neighbors who testified "in several previous variance applications that had been filed by the Duncans." Clearly, such "past opinions of neighbors" can have no bearing or relevance to the instant case, due to dissimilar application and plans submitted (layouts, densities, etc.) which presented totally differing factual circumstan-

ces upon which opinions may have been elicited (such past objections may no longer be existent in the present controversy!)

Likewise, any consideration by the Ohio Supreme Court as to the statements of neighbors at the November 1982 meeting, is erroneous in that at such meeting a quorum of the board was not present and therefore no oaths were given and all statements were clearly off the record.

A final error occurs in the Courts' assertion, dispite their artful attempt of wording such to make it appear that the area is comprised mainly of "one and two-family dwellings". However, such disguises a true assessment of the land use characteristics of the area by failing to disclose all of the relevant physical land use facts.

While there does exist one and two-family dwellings interspaced throughout the area, (however, far from being considered homogeneous) a careful scrutiny of the testimony, land use map (Exhibit C-Existing Land Use

Map) and photographs (Exhibit C-PH Existing Land Use Photos) as introduced into the record by the Duncans, clearly indicates that the neighborhood (as delineated as those lots within 300 feet of the locus) is well-diversified in land uses and specifically contains the Burton Manufacturing Co., a bowling alley, (3) three multi-family residential uses (one of 8 families) and a law office directly adjacent to the north of the Duncans' lot (emphasis added). Also, within 500 feet exists 2 more industries, one of which is the Countys' largest employer, and a pet hospital.

This diversification of land uses in the neighborhood is noted in the Ohio Supreme Courts' opinion as emphasized in the dissenting opinion of Clifford Brown where he setsforth the concession by the chairman of the board of the existence of multi-family dwellings in the area at page 89 as follows;

> "However, I cannot support the majority's position that the Duncans "did not suffer 'practical difficulties' as a result of the restriction," that "construction of an eight-unit dwelling on the Duncans' lot would 'alter the essential nature of the neighborhood,'" and that the record reveals "that community interests outweigh the competing interests of the Duncans in this case."
>
> Although the fulcrum of this court's decision is a newly announced series of some seven factors to be weighed, in my view a careful consideration of those factors supports the Duncans' application. The sole testimony offered in support of the resolution denying the application belies the basis for its denial. As to the effect on the "essential character of the neighborhood," zoning board of appeals chairman Dave Adams stated that although there were "minute differences in the footage on the properties" and there were "very few properties in that neighborhood that are wide enough to have multi-family dwellings," he conceded "(t)here are instances where there are multi-family dwellings," just "not to the quantity" that the Duncans sought to construct."

The significance of the industries and the dense population in this neighborhood (36 families) is indicated in the record of this case in Common Pleas Court Judge Viets' ruling which reversed this same board and therefore, allowed for the law office usuage on the property directly north of the

Duncans' lot. The judge specifically stated the unreasonableness of disallowing such law office, "especially in a densely populated area where industry is situated on the other side of the street."

(Note; This ruling illustrates a contradiction, in that, how could the present board find an alteration in the area now from the Duncans' permitted multi-family use, when this Court earlier had stated the non-effect on the area from a non-permitted use law office).

Furthermore, even assuming that such alleged land uses exist in the area, such Court fails to explain anywhere how, that alone, causes such an alteration in the neighborhood! (Additionally, the Court did not make a finding that such alteration was substantial, as the third factor as stated in their syllabus requires.)

Furthermore, it is interesting to note that had there been a legitimate basis of any "detrimental affect" on these neighbors it would have been expressed by the urban planner hired by the Village, Robert C. Hill.

However, the record clearly indicates that he prepared and submitted an expert report for the record, which was later deleted by the board (emphasis added).

The dissenting opinion of Clifford Brown in the Ohio Supreme Courts' ruling clearly indicates the only concern anywhere expressed in the record of any "detrimental affects", and he notes the inadequacies of such at page 89 as follows,

> "Adams also testified to his opinion that the proposed construction would be "detrimental to public welfare," thus failing to satisfy another ordinance criterion. On that issue, Adams spoke of his concern that the windows in the proposed dwelling would face windows of existing structures, and "(d)epending upon the nature of those persons renting those properties, being at the back of those houses, I just felt that it really wasn't good for the neighborhood***". Of course, the "nature of the potential tenants is an impermissible basis upon which to determine requests for area variances. Thus, the flimsy community interests expressed are outweighed by the competing interests of the Duncans."

To the contrary, however, as the record indicates is that all of the yard requirements of the zoning ordinance were met and

that the surrounding properties were well bufferred from the proposal by the fencing and screening required by the zoning ordinance, the trees and the considerable distances between the structures (see Plot Plan).

In addition to the above stated inadequacies of the Courts' assertion, a <u>further reason</u> as to why this finding is insufficient to support the Courts' ruling is that, from examining the <u>whole record</u> in this case it does not setforth any <u>legitimate supporting proof</u> whatsoever, to justify how the neighborhoods essential nature would be altered by the Duncans' proposal.

In the <u>entire record</u>, the only comments made were those insufficient statements setforth by the few neighbors (as discussed earlier) and the board chairman (Adams) in regards to "windows of the structures facing one another".

Furthermore, there was no mention of any accrued "permissable state objectives" or "legitimate governmental interest advance-

ments", (which are inherent to zoning cases under the "rational basis" or "reasonable relationship" test in direct constitutional attacks on legislation) as are often elaborated on by this Court[1] and the state courts

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[1] While the Duncans are fully aware that such "interests" and "objectives" of such tests are inherent to cases involving constitutional challenges to enacted legislation, and are not the focal point of this case, such cases in regards to zoning have some relevance to the Duncans' case, in that the courts have long upheld the preservation of neighborhoods (or conversely, the prevention of their alteration) as an overall legitimate exercise of a governments' police power (in advancing the publics'interest).

In this courts'case of Young v. American Mini Theatres, 427 U.S. 50 (1976) Justice Powells' concurring opinion noted as follows;

> "without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values (and therefore, zoning, when used to preserve the character of specific areas of a city is perhaps the) most essential function preformed by local government."

Furthermore, these cases have some relevance herein, in their illustration of the factual support or basis which is required or necessary in making valid governmental determinations in regards to such "residential areas or neighborhoods", which is fatally lacking in the Boards' and lower courts' finding in the instant case (simply stated, what they failed to show in order to justify that an alteration in the neighborhood would occur!)

In general terms, such legislation is upheld as valid in these cases if it is rationally based upon or rationally related to a showing of an advanced "permissable state objective" or likewise a "legitimate governmental interest" (specifically as found in the evidence or the reasonable expectation or anticipation of the occurence of such).

This Court in the case of Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) masterfully setforth a historical account of the universe or multitude of these specific "objectives" or "interests", by first referring to the historic police power problems to be controlled by the legislation as discussed in Euclid v. Ambler, in its opinion at page 4 as follows;

> "danger of fire or collapse of buildings, the evils of overcrowding people and the possibility that offensive trades, industries and structures might create nuisances to residential sections".

This opinion further noted that these problems need not loom large or actually be existent in a given case but that it was a legitimate exercise of zoning to;

> "keep residential areas free of disturbing noises; increased traffic; the hazard of moving and parked automobiles; the depriving children of the priviledge of quiet and open spaces for play, enjoyed by those in more favored localities."

This case further setforth this courts holding in Berman v. Parker 348 U.S. 26 which refused to limit the concept of public welfare, and stated that in order to protect the public interest, purpose or needs it was;

> "within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

In referring to the ordinance challenged in Village of Belle Terre v. Boraas, this Court at page 9 than stated that "family needs" (quiet places where yards are wide, people few and motor vehicles restricted) are a permissable goal of the police power (within Berman v. Parker) and that it is;

> "not confined to elimination of filth, stench and unhealthy places, but ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the

area a sanctuary for people."
(Note; furthermore, this Court has held that reducing air and noise pollution and traffic hazards in residential areas are legitimate objectives, County Board of Arlington County Virginia v. Richards, 434 U.S. 5 (1977), along with regulations enhancing the quality of life by preserving the character and desirable aesthetic features of a city, Penn Central Transport Co. v. New York City, 438 U.S. 104.)

It must be emphasized that in the cases before this Court, these alleged "governmental interests" setforth in support of the governments actions or legislation were generally substantiated with an evidentiary or factual basis, either usually;

-by the studies or testimony of urban planners and real estate experts (Young v. American Mini Theatres, supra, or

-although without the benefit of studies specifically relating to the areas particular problems, at least relying on the experiences of and studies produced by, nearby cities (Renton v. Playtime Theatres, Inc. (No. 84-1360)) ; (also see, the sufficiency of setting forth in support, specific physical land use facts, Wilkins v. City of San Bernardino, 29 C 2d 332).

Therefore, in view of this background, it stands to reason in the instant case that if there likewise, was a showing in the evidence of a specific "advanced governmental interest" (or at least a reasonable expectation of the occurance of such) in support of such boards'or courts' finding (that denying the Duncans' variance would prevent the alteration of the character of the neighborhood), such action would therefore, be justified (and warrant the governments unwillingness to remove the restriction sought to be varied).

However, in the Duncans' case, such a finding cannot be made and is grossly insufficient, in that, as was elaborated upon earlier, there was merely a few insufficient comments setforth in the record, and certainly no evidence as to any actually existent or reasonably expected "advanced government interest" was setforth in the record by anyone (for example, as to how the increased traffic congestion would alter the character of the area, or how the diminuation in property values would "detrimentally affect" the neighbors homes, etc.)

(such as those found by the Ohio Supreme Court in the case of Leslie v Toledo, 66 Ohio St. 2d 488). For example, the board and the lower courts did not so much as utter a spoken word in the record as to any adverse changes in traffic and pedestrian patterns, added air or noise pollution or increased safety hazards (such as on street parking etc.) which would spillover to the neighborhood if the (8) eight unit proposal was constructed.

Additionally, not even (1) one on-site problem which would indicate the unsuitability of the lot for the proposal, such as surface drainage problems or inadequate pedestrian or vehicle access, was setforth by anyone!

However, to the contrary, the record clearly indicates as setforth in the Duncans' 2-Part Analysis (which setforth the land use characteristics and existing conditions, population densities, etc., within 300 feet of the Duncans' lot and then evaluated the

impact of the proposal on such elements, for example, a traffic engineers estimation as to traffic generation) that massive amounts of substantial reliable and probative evidence was setforth as to how such as alteration would not occur.

Consequently, in the courts below, the Duncans setforth the well-established law, that indicates, that where there is no evidence backed by facts or expertise to support a stated finding, that such is merely a "generalized conclusion" and has no "probative value".

This Court similarly setforth this principle recently, (as written by Justice Brennen and Justice Marshall in the dissent in Renton v. Playtime Theatres Inc. (No 84-1360)), which stated that, in the absence of such required proof, any determinations by the government "were not findings at all, but purely speculative conclusions".

Therefore, it is inescapable, that by law such unsupported finding by the board or the

courts as to an alteration of the neighborhood merely constitutes a "speculative conclusion".

A final reason as to why this Courts finding is erroneous and insufficient to support its ruling is that such claim of an alteration of the character of the neighborhood is in direct contrast with the assumed nature of area variance requests (assummed non-harm), and the record does not indicate any reason why such case qualifies as an exception thereto.

It needs no elaboration here that in the case of area variances (due to the "deemed compatibility" of such permitted uses which therefore introduce no alien uses or activities into the area) that it is assumed that no harm would occur to the area from a proposed permitted use and consequently, "neighborhood considerations are not as strong as in use variances" (Matter of Hoffman vs Harris (1966) 17 NY 2d, 138).

This is well stated by the 3 Anderson, American Law of Zoning (2 Ed. 1977), Variances, Section 18.46, at page 267 as follows;

> "The prime justification for requiring less of an applicant for an area variance than is required in the case of a use variance is that the former does not affect the use of the land. An area variance is thought not to threaten adjacent land with the establishment of an incompatible use, or to hazard the maintenance of a use which will change the essential character of the neighborhood."

Therefore, it is not surprising that the Duncans, after extensive research, could only find (4) four cases[2] where the granting of an area variance was found to cause "harm". Within these rare and unusual cases the facts or evidence firmly indicated that;

1) the lot was not suitable for such intended purpose (topography, size, etc.) or that
2) the variances requested were numerous, substantial or of great magnitude, or that
3) some significant fire hazard, drainage problem, inadequate provision for light and air, etc. would occur by the granting of the area variance.

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[2] These cases were as follows;
Rogers v. Zoning Board of Appeals of Orange 227 A2d 91
Deardorf v. Fort Dodge 254 Iowa 380
National Merritt v. Weist 41 NY 2d 438
Markovich v. Feriola 247 NYS 2d 29.

Consequently, a review of the total record in the instant case does not reveal that any of these above stated factual circumstances exist (for example, only (1) one mere (12) twelve foot variance is requested, and as was shown earlier no proof was setforth as to the unsuitability of the lot or any accrued "advanced governmental interests") to therefore categorize the Duncans' case as an exception to the general law of area variances, and therefore such finding conflicts with such law and is erroneous.

In summation, for the above stated reasons, it is obvious that neither the "assertion" as setforth by the Ohio Supreme Court or the evidence in the record of this case whatsoever supports the courts' or boards' finding that the Duncans' variance would alter the essential nature of the neighborhood, and consequently such finding provides no foundation to support the courts ruling.

Furthermore, as such finding was the sole basis setforth as to any alleged affect on

the "community interests", it is obvious that such "community interests" are non-existant in the instant case.

FINDING - THE DUNCANS COULD HAVE MADE BENEFICIAL USE OF THEIR PROPERTY AND RECEIVED A REASONABLE RETURN

The Ohio Supreme Court setforth this finding and supporting rational in its opinion at page 87 as follows;

> "First, the Duncans could have made beneficial use of their property and received a reasonable return either by construction of additional duplexes (which would not have required a variance from existing frontage requirements) or by construction of a four-unit addition to the existing dwelling as per the variance granted in April 1980. The Duncans offered no evidence to show that these plans were not economically feasible, and in previous hearings before the board they indicated only that such plans were less feasible than the construction of the proposed eight-unit dwelling."

(Note; this finding appears to be the major basis upon which the Ohio Supreme Court arrived at its determination as to the weight of the "Duncans' interest" which would be affected by the denial of their variance request; implying that they showed no or very little of a deprivation in property loss interest).

A major error of this finding is that this court has implemented the harsh "hardship

requirement" (which is one of the (3) three basic elements for "use variance" applicants, see Otto v. Steinhilber, 282 N.Y. 71, 24 N.E. 2d 851 (1939)), into the list of factors or considerations to be considered under the "practical difficulty" test for area variances (see paragraph (3) three of its syllabus) and applied such to the Duncans' case.

It is well established in zoning law that because use variances seek a "use which is outside of the uses permitted by the zoning ordinance" (wording as used by Ohios' Supreme Court in Kisil), it is required and reasonable for courts in such instances, to question or test whether a reasonable return or beneficial use can be derived on the subject property from any of the uses permitted under the ordinance. Therefore, the applicant for such use variance generally has the burden to prove with evidence that it cannot receive such a result from the permitted uses, therefore, justifying why he is entitled to seek a desired non-permitted use of his property

in order to avoid the confiscatory operation of the ordinance.

Consequently, in the instant case the courts' statements emphasizing the "reasonableness of constructing duplexes on such lot" (which are permitted uses under the zoning ordinance) and that the Duncans offerred no proof (or failed to meet their burden with evidence) to show that these plans (duplex or the 4 family proposal) were not economically feasible, clearly indicates the Courts misdirected focus upon such inquiries which are strictly confined to use variances.

However, there is no authority whatsoever, as setforth in Wachsberger v Michalis, 19 Misc. 2d 909, 191 N.Y. Supp. 2d 621 (the case upon which Ohios' Supreme Court relied upon) or any of the leading zoning treatises of this nation which requires such "extent of proof" in area variance requests. (certainly, the Duncans could have offerred such proof had they known this court would impose such misapplied law!)

Even assuming that such "hardship requirement", by law, was appropriate herein, the court further errors in that it merely "speculates" as to it's finding. This was emphasized in the dissenting opinion by Justice Brown at page 89 as follows;

> "The majority's speculation that the Duncans could have "received a reasonable return" either by construction of additional duplexes or of a four-unit dwelling enjoys no evidentiary support."

Furthermore, this court errors in this finding by giving any effect or weight to the April of 1980 variance as granted to the Duncans (4 unit addition). The record of this case clearly indicates that such variance was a unilateral variance grant as it was granted with conditions, and therefore, while such conditions have not been complied with, such variance has no present legal effect (or ever has had any) La Sala v. Garcia 70 N.Y.S. 2d 833. (also, see the Court of Common Pleas' ruling in the Appendix herein, as to the non-relevance of such variance to this case, and of which the Village did not appeal).

To the contrary, the evidence in the record indicates that the "Duncans interests" have been greatly affected in their 80% density loss which accrues from the frontage provisions restricting the lot to (1) one duplex (2 units vs. the proposed and allowable by density 10 units which would generate income by the renting or selling such units). Furthermore, the record indicates that the Duncans have met the other numerous hardship requirements (which needn't even be financial) for area variances.

In summation, for the above reasons, it is obvious that the Ohio Supreme Courts' finding and rational as setforth in support that the Duncans could have made beneficial use of their property and received a reasonable return is insufficient to support the Courts ruling. Furthermore, as such finding was the major basis as to the alleged no or little loss in property interest to the Duncans, it is obvious that such "losses" indeed are significant in the instant case, in view of

the above noted 80% density loss.

FINDING - IT CANNOT BE EASILY DETERMINED FROM THE RECORD WHETHER THE REQUESTED VARIANCE WAS SUBSTANTIAL

This further finding and supporting rational as relied on by the court was stated at page 87 as follows;

> "Second, it cannot easily be determined from the record whether the requested variance was "substantial," especially because the evidence presented did not show that other variances had been granted to allow the construction of multi-family dwellings on lots having less than one hundred feet of frontage. In any event the available evidence does not indicate that the Duncans were treated differently than any other applicant seeking a variance from the frontage requirements for multi-family dwellings."

The major error of this finding is that there is no authority whatsoever, in area variance law which allows this Court to inquire under this "substantial" factor (extending the legal requirements) whether;

1) other variances had been granted similar to the Duncans' request, and
2) were the Duncans treated differently than any other applicant seeking a variance similar to the Duncans?;

and then to arrive at a conclusion that such variance is indeed "substantial" (or at least

that it can't be easily determined from the record) because there was no evidence in the record to support such occurrences happening.

Clearly, the law of area variances sets-forth the common and ordinary meaning of such factor to solely include an examination of how substantial the specific variance request is in relation to the zoning requirement which is sought to be varied. (see, Wachsberger v. Michalis 191 N.Y.S. 2d 621) Accordingly, the evidence in the record indicates that the Duncans have favorably satisfied such factor of not being "substantial", in that they requested a less than 12 foot variance from the 100 foot requirement (a mere 12% request, as referred to by Justice Brown at page 89 in his dissent as a "slight area variance").

This Courts "wide of the mark" interpretation of such factor is further illustrated in the case of Kisil v. Sandusky 12 Ohio St. 3d 30 (1984) in which the opinion did not so much as utter a word as to a "substantial

variation", in which the minimum area restriction (density) of 5,500 square feet for a duplex (2,750 square feet per family) was varied to allow a duplex on a lot which merely contained 2,100 square feet, amounting to a greater than 50% variance! Particularly, in view of this, the Duncans' 12% request could hardly be considered "substantial".

In summation, for the above reasons, it is obvious that such finding and rational as setforth in support provides no foundation to support the Courts ruling.

FINDING - THE DUNCANS' PREDICAMENT COULD HAVE BEEN OBVIATED THROUGH THE CONSTRUCTION OF DUPLEXES.

A further finding and supporting rational as relied on by the court was setforth at page 87 as follows;

> "Fourth, as discussed above, the Duncans' predicament could have been obviated through the construction of duplexes rather than multi-family dwellings. The construction of duplexes on the Duncans' lot would not have required a variance from the applicable frontage requirements in the village zoning ordinances."

Once again, this courts' finding is in error in that it deviates from the common and ordinary meaning of one of the factors of the "practical difficulty test", which is well-established in the zoning treatises on area variances. Within the "obviated factor", the accepted inquiry is whether the property owner could alternatively 1) buy adjoining property to enable the compliance with the regulation sought to be varied or to 2) sell his property at a reasonable cost to eliminate a need for a variance. Clearly, in the instant case there is no evidence in the record to support that either method could obviate the Duncans' difficulty.

However, even assuming that such courts' interpretation, by law, was correct, the court first of all errors in such finding in that, as was noted earlier, it merely "speculates" that duplexes would be a beneficial use or receive a reasonable return, and therefore, obviates the Duncans' predicament.

This court commits a second error, again

by merely "speculating" that the construction of more duplexes on the lot, other than the existing one, is allowable "free and clear" of the frontage regulations and all other regulations of the zoning ordinance, thus alleviating the need to resort to any variance method whatsoever (the basic tenet of this factor). Clearly, this court, without even a copy of the zoning ordinance before it in the record, has exceeded its authority herein by sitting as a "Super Zoning Inspector", and has no idea whatsoever of the many other variances (besides frontage) which are necessary to allow more than (1) one duplex dwelling upon such lot!

In summation, for the above reasons, it is obvious that such finding and rational as setforth in support is insufficient to support the courts ruling.

(Note; as was shown above, none of the courts' findings were sufficient to support its ruling and therefore it appears that the Ohio Supreme Courts' undisclosed motive in

denying the Duncans' variance was due to their being troubled over the fact that the Duncans have applied for many permits and variances on the property along with pursuing numerous judicial proceedings (see their elaboration in footnote 1 of their opinion). However, any inappropriate undertakings for permits , variances or judicial proceedings by the Duncans must be curtailed by the principles of the law of administrative res judicata or res judicata, and not by abuses of judicial discretion as committed herein by this court! Clearly, such laws have no effect herein to the instant case.)

3. THE DUNCANS' CONSTITUTIONAL PROTECTED RIGHT FROM BEING DENIED THE EQUAL PROTECTION OF THE LAW IS VIOLATED WHEN THE OHIO SUPREME COURT PREVIOUSLY RULED ON A SIMILAR APPLICATION FOR AN AREA VARIANCE IN KISIL V. SANDUSKY, AND THERE IS NO RATIONAL BASIS SETFORTH AS TO WHY SUCH

COURT DID NOT; 1) SUBJECT THAT APPLICANT TO SUCH DISFAVORABLE ERRONEOUS PRINCIPLES OF THE "PRACTICAL DIFFICULTY TEST" AS APPLIED IN THE DUNCANS' CASE, OR 2) MAKE SIMILAR FAVORABLE FINDINGS IN THE DUNCANS' CASE AS THOSE IN KISIL WHERE THE SUPPORTING FACTS IN THE RECORDS OF EACH CASE ARE NEARLY IDENTICAL.

The third reason necessitating the granting of such writ, is to illustrate to this Court, the discriminatory treatment the Duncans received from the Ohio Supreme Court in their area variance case in relation to the applicants in the earlier case of Kisil v. Sandusky 12 Ohio St. 3d 30. The specific acts of this disparity in treatment will be setforth below (see the Appendix for those portions of the Kisil opinion which are relevant herein).

First of all, as was noted earlier, the court disfavorably to the Duncans made a finding that they were not deprived of a beneficial use or reasonable return on their

property, due to the feasibility of constructing a permitted use, duplexes on such lot.

The discriminatory treatment toward the Duncans by the Ohio Supreme Court under this finding is clearly evident in that under Kisil, the court advantageously to the applicant made no such finding nor did it even inquire whatsoever as to whether the single-family usuage (a permitted use under the ordinance) could have been a beneficial use of the property or received a reasonable return. (Note: the court did not apply the use variance "hardship requirement" to Kisil).

Secondly, as was noted earlier, the court disfavorably to the Duncans made a finding that their variance request (predicament) could have been obviated by the construction of duplexes (a permitted use of the ordinance not requiring a frontage variance) on the lot.

The discriminatory treatment toward the Duncans by the Ohio Supreme Court under this "obviated" finding, is clearly evident in that under Kisil, the court advantageously to

the applicant made no such finding nor did it even inquire whatsoever as to whether Kisils' predicament could have been obviated through a permitted use of the ordinance, single-family, rather than a duplex usuage. Also this court did not even mention that such single-family usuage would likewise not have required a variance on its area requirement.

Thirdly, as was noted earlier, the court disfavorably to the Duncans made a finding that there was a "substantial variance" requested in their case in that the available evidence does not indicate that the Duncans were treated differently than other applicants.

The discriminatory treatment toward the Duncans by the Ohio Supreme Court is that such court completely ignores the past occurences on the Collier property, as constituting "different treatment" (while the court in Kisil advantageously to the applicant makes such a finding of "different

treatment", in relying on the instance where a multi-family use variance was granted on a lot).

The record of this case, clearly indicates that a permit for a law office (a non-permitted use in the zoning district) was issued and such use presently exists on a lot directly adjacent to the Duncans' lot which only had 85 feet of frontage (3 feet less than the Duncans'lot). More surprisingly, this same board of appeals, while finding that the Duncans' proposed permitted use, multi-family would alter the character of the neighborhood, specifically in the Collier case, found that the "location, design and operation (of such non-permitted use, law office) would not discourage or interfere with the appropriate development or impair the value of the surrounding residential district".

Fourthly, as was noted earlier, the court disfavorably to the Duncans made a finding that their variance if granted would alter

the essential character of the neighborhood.

The discriminatory treatment toward the Duncans by the Ohio Supreme Court under this finding is clearly evident in that extremely similar land use characteristics in the neighborhood exist within the Duncans' case and within Kisil, and yet this Court advantageously to the Kisil applicant made a finding that no alteration would occur to such area.

Within the "immediate area" of Kisil, (in which the court alleged in Duncan that there existed mainly single and two-family dwellings), it is also true that the majority of the lots were of a "more restrictive" type land use as compared to that use proposed, a duplex (of the (20) twenty lots proximate to the subject property, (11) eleven were devoted to single-family land uses). This fact is evident from the Land Use Map and Photo's of Kisil as submitted by the Duncans before the Ohio Supreme Court.

This court makes no mention of these single-family land uses being affected by the proposed use in Kisil, but than in the Duncans' case as stated earlier, it asserts the existence of these more restrictive type uses in the "immediate area" as a contributing reason for the alteration of the character of the neighborhood.

In summation, while there is no rational basis setforth anywhere for this disparity in treatment and some legitimate interest of government, the Duncans in proceeding "pro se", contend the violation of their equal protection rights (this court doesn't have a good enough reason to injure the Duncans while treating the applicant in Kisil so much better.)

4. THE DUNCANS' MASSIVE AMOUNT OF EVIDENCE AS SETFORTH IN THE RECORD OF THIS CASE CLEARLY INDICATES THAT THEY OVERWHELMINGLY HAVE FAVORABLY SATISFIED THE FACTORS OF THE "PRACTICAL DIFFICULTY TEST"

TOWARD ESTABLISHING THEIR PRACTICAL DIFFICULTY, THEREFORE ENTITLING THEM TO THEIR REQUESTED AREA VARIANCE.

In the proceedings before the Ohio Supreme Court the Duncans in their 85 page Brief set-forth extensively as to how the evidence in the record of this case indicated that each and every factor of the "practical difficulty test" (5 factors as stated in Wachsberger v. Michalis and 6 other miscellaneous factors) was favorably satisfied toward establishing their practical difficulty. However, due to problems of economy in this petition (65 page limit), the Duncans are unable to herein cover their total presentation and have therefore only briefly mentioned relevant portions of this evidence in the prior sections.

Accordingly, the fourth reason necessitating the granting of such writ, is to present to this court this detailed discussion, which clearly indicates that the granting of the Duncans' area variance is justly warranted.

Nevertheless, a brief summary of such evidence under each factor will be outlined below;

Wachsberger Consideration (1)- No Substantial Variation is Requested - the mere 12% variance request is minimal (see page 43 of this petition),

Wachsberger Consideration (2)- No Effect of Population Increase on the Governmental Facilities- the effect of the proposed increase of (8) eight residential units on the villages' water and sewer system would be miniscule, if that.

Wachsberger Consideration (3A)- No Substantial Change in the Character of Neighborhood -this was concluded from the Duncans' (2) two part analysis (see pages 5,6,23,24,25,26,32, and 36 of this petition) which analyzed the neighborhood and found this based on 1) the existing diverse land use circumstances and conditions (traffic congestion, air, noise pollution,etc.); population and densities (36 families with some lots far denser than the Duncans' proposal); aesthetics/age and conditions of structures (older and deteriorating buildings); and many non-conforming lots (see below) and the 2) projected impact of such 8 units on such elements, for example the traffic engineers' estimate as to expected traffic generation.

Wachsberger Consideration (3B) - No Substantial Detriment to Adjoining Properties Created -neighbors only setforth resulting loss of privacy; neighbors properties well bufferred from proposal (see page 28 of this petition).

Wachsberger Consideration (4)-The Difficulty

Cannot be Obviated Otherwise Than by a Variance- (see page 45 of this petition) and that only a 12 foot variance would permanently relieve difficulty.

Wachsberger Consideration (5)- The Interests of Justice Will Be Served By Allowing The Variance - no elaboration necessary.

A Sufficient Hardship Has Been Shown- an economic hardship of an 80% density loss occurs from the variance denial (see page 41 of this petition).

There Are Existing Identical and Lesser Restrictive Type Land Uses In The Neighborhood In Relation To That Which Is Proposed- 3 multi-family residential lots (one of 8 units), a law office, a bowling alley and an industry exist within 300 feet of the Duncans' lot (2 more industries and a pet hospital exist within 500 feet),(see pages 24,25, and 26 of this petition), The accompanying conditions from these uses overides or overpowers any possible affect from the Duncans'proposal.

There Are Existing Similar Non-Conformities- 8 of 12 lots in the neighborhood which have frontage requirements in the zoning ordinance have inadequate frontage and 6 of these 8 are far more deficient than the Duncans'12 feet.

There Is An Accrual of Public Benefits From The Area Variance Grant- traffic accident reports indicate that the hazardous backing of vehicles onto South State Avenue would be eliminated from the Duncans' site proposal.

There is A Request Similar to the Applicants Granted Within The Neighborhood - the Collier law office, a non-permitted use (see pages 50 and 51 of this petition)

There Are Favorable Results of the Combination Tests- as "community interests" are non-existent herein (see pages 15-37 of petition) the Duncans' 80% density loss outweighs such interests.

CONCLUSION

As has been shown herein, the Ohio Supreme Court has arrived at its ruling that the Duncans have not shown "practical difficulty" by way of various "erroneous tactics" designed to 1) minimize the affect upon the "Duncan's interest" if the area variance is denied (the Duncans have never alleged a "total confiscation" or that the zoning classification renders their property valueless) and to 2) maximize the harm or outweighing affect upon the "community interests" if such area variance is granted.

However, as shown herein, the salient point is simply that there is no legitimate or sufficient proof in the record whatsoever, to support the Ohio Supreme Courts' overall conclusion that the "interests of these groups (community, neighborhood and adjoining property owners) would not be served" (or that they would be "harmed") from the granting of the variance, or to support this courts' sole

specific finding and assertion setforth as a basis thereof, (and the Common Pleas Courts' and boards' finding) that there would be an "alteration in the character of the neighborhood" from the variances granting (as indicated, such ruling and finding; is squarely based on numerous "factual errors" and "unsubstantiated viewpoints of neighbors" and violates due process requirements; is unsupported with any showing of "advanced governmental interests" and is merely a "speculative conclusion"; and directly counters area variance law in that within the same breath of this courts opinion it twice mentions the Matter of Hoffman v. Harris (1966) 17 N.Y. 2d 138, principle that "neighborhood considerations are not as strong as in use variances").

Consequently, such unfounded in evidence, arbitrary and capricious action or result by this Court, while under the guise of advancing the governments' interest, advances nothing and merely infringes on the Duncans' right to

"freedom from all substantial arbitrary impositions and purposeless restraints" (Justice Harlans' quote as cited in Moore v. East Cleveland, 431 U.S. 494) and constitutes a deprivation of private property without due process in violation of our constitution.

This principle was recently setforth by this court in Daniels v. Williams (No. 84-5872) as follows;

> "the fourteenth amendment is part of a constitution generally designed to allocate governing authority among the branches of the Federal government, and between that government and the states, and to secure certain individual rights against both state and Federal Government" (arbitrary exercise of the powers or action of government)

(see also, Schad v. Mount Ephraim 452 U.S. 61, where it states "the zoning power is not infinate and unchallengeable; it must be exercised within constitutional limits", and Eastlake v. Forest City Enterprises, supra, where it states in footnote 10 at page 675 that "the critical constitutional inquiry, rather, is whether the zoning restriction produces arbitrary or capricious results".)

Such abuses as committed by the Ohio Supreme Court were setforth by Justice Brown in his dissent at page 89 as follows;

> "In essence, the application of the majority's seven-factor practical difficulties test to the Duncans' application compels a conclusion based on reasonableness and justice, the bottom line in any case, that the court of appeals be affirmed and that appellees be granted the slight area variance that they seek. Indeed, the majority's application of those seven factors against appellees on this case reveals that the practical difficulties test has been rendered so spongy and flexible as to validate any arbitrary and capricious restriction on use of property that may be desired.
>
> Accordingly, I would affirm the judgement of the court of appeals"

Furthermore, such Ohio Supreme Courts' differing applications of such principles of the "practical difficulty test" and opposite findings based on similar facts, in Kisil and in the instant case, constitutes a deprivation of property rights and liberties in violation of our constitutions' equal protection clause.

Accordingly, the Duncans respectfully request this Court to grant such writ in

order to allow for their "by right" appellate review of the record ("merits") of this case. Such review will unveil such abuses and violations of the Duncans' rights as committed by this court and the massive amount of evidence as setforth by the Duncans in the record of this case which clearly indicates that they overwhelmingly have favorably satisfied the factors of the "practical difficulty test" toward establishing their "practical difficulty", consequently, warranting the reversal of the decision of the Ohio Supreme Court and the granting of the Duncans' area variance.

Certainly, such are "special and important reasons" for this review in that no judicial system can allow such injustices to individual rights to go uncorrected.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided April 11, 1986)

Case No. 85-350

THE SUPREME COURT OF OHIO
Columbus

RICHARD DUNCAN, et. al.,
Appellees,

vs.

VILLAGE OF MIDDLEFIELD
Appellant.

The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially

altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of government services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owners predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

APPEAL from the Court of Appeals for Geauga County.

Appellee Lorraine J. Duncan is the owner of a residential lot in the village of Middlefield. A single duplex is located on the "bowling alley" type lot, which has a frontage of 88.25 feet and a depth of 521 feet. Appellee Richard A. Duncan, who is Lorraine Duncan's son, agreed to purchase the lot

contingent upon "zoning approval" for the construction of multi-family dwellings thereon.

In October 1982, the Duncans filed an application for a variance with the Middlefield Zoning Board of Appeals ("board") seeking authorization for construction of an eight-unit multi-family dwelling behind the existing duplex. At the time of this application, the Duncans' lot was located in a district zoned for multi-family dwellings, but the lot was approximately twelve feet short of the frontage requirement for construction of such dwellings. The Duncans' application thus sought an "area" rather than a "use" variance.

Public hearings were held on the Duncans' application in November and December 1982; and, on January 5, 1983, the board denied the variance on the grounds that the application did not comply with the criteria for variances that were set forth in Section 1133.06 of the Codified Ordinances of the village of Middlefield. At the same time, however, the board reaffirmed a variance that had been

granted in April 1980 to authorize the conditional construction of a four-unit addition to the dwellings on the Duncans' lot[1]. (footnotes at end of opinion)

Pursuant to R.C. Chapter 2506, the Duncans appealed from the board's determination to the Court of Common Pleas of Geauga County. The court affirmed the board's denial of the Duncans October 1982 variance request after finding that the denial was "supported by the preponderance of substantial, reliable and probative evidence on the whole record".

The Duncans then appealed to the court of appeals, which reversed the common pleas court and remanded for "further proceedings" in light of this court's decision in Kisil v. Sandusky (1984), 12 Ohio St. 3d 30. The appellate court held that Kisil, which was decided subsequent to the common pleas courts decision in this case, requires a determination as to whether a party seeking an area variance is faced with "practical difficulties" in the use of his property. Since the

common pleas court, in reviewing the board's denial of the Duncans' variance, had merely affirmed the board's finding that the Duncans were not faced with "unnecessary hardship," the appellate court determined that the common pleas court had erred.

The cause is now before this court persuant to the allowance of a motion to certify the record.

Richard A. Duncan, for appellees.

Kelly, McCann &Livingstone, Stephen M. O'Bryan and John L. Habat, for appellant.

SWEENEY, J. In Kisil v. Sandusky, this court held in the syllabus:

> "The standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use. An application for an area variance need not establish unnecessary hardship; it is sufficient that the application show practical difficulties."

In adopting the lesser, practical difficulties standard for area variances, we relied, in part, upon the analysis of the New York Court of Appeals in Matter of Hoffman v. Harris (1966), 17 N.Y. 2d 138, 269

N.Y. Supp. 2d 119, 216 N.E. 2d 326. In Harris, the court effectively determined that in reviewing an application for an area variance, where "neighborhood considerations are not as strong as in use variances," id. at 144, the "spirit" rather than the "strict letter" of the zoning ordinance should be observed so that "substantial justice (is) done," id. at 147. In observing the spirit of an ordinance and attempting to do substantial justice, a zoning board of appeals or a reviewing court necessarily must weigh the competing interests of the property owner and the community. When an area variance is sought, therefore, the property owner is required to show that the application of an area zoning requirement to his property is inequitable.

While existing definitions of "practical difficulties" are often nebulous, it can safely be said that a property owner encounters "practical difficulties" whenever an area zoning requirement (e.g., frontage

setback, height) unreasonably deprives him of a permitted use of his property. The key to this standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable. The practical difficulties standard differs from the unnecessary hardship standard normally applied in use variance cases, because no single factor controls in a determination of practical difficulties. A property owner is not denied the opportunity to establish practical difficulties, for example, simply because he purchased the property with knowledge of the zoning restrictions. Kisil, supra, at 33; cf. Consolidated Mgmt., Inc. v. Cleveland (1983), 6 Ohio St. 3d 238.

The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there

can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of government services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owners predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance. See, generally, 3 Anderson, American Law of Zoning (2Ed. 1977), Variances, Section 18.47 et seq.; Wachsberger v. Michalis (1959), 19 Misc. 2d 909, 191 N.Y. Supp. 2d 621.

The appellant, village of Middlefield, as-

serts that, in spite of the board's finding that the Duncans had not suffered "unnecessary hardship" as a result of the zoning restriction in question, other relevant findings by the board show that the Duncans also did not suffer "practical difficulties" as a result of the restriction. Specifically, the village points to the board's findings that construction of an eight-unit dwelling on the Duncans' lot would "alter the essential nature of the neighborhood" and "not represent the minimum variance that would afford relief or the least modification possible so as to provide a reasonable use." The village contends that these findings and the evidence in the record reveal that community interests outweigh the competing interests of the Duncans in this case. We agree.

Upon consideration of the relevant factors for a practical difficulties determination, as enumerated above, it is clear that the Duncans have not encountered the practical difficulties needed to warrant the approval

of their application for variance. First, the Duncans could have made beneficial use of their property and received a reasonable return either by construction of additional duplexes (which would not have required a variance from existing frontage requirements) or by construction of a four-unit addition to the existing dwelling as per the variance granted in April 1980. The Duncans offered no evidence to show that these plans were not economically feasible, and in previous hearings before the board they indicated only that such plans were less feasible than the construction of the proposed eight-unit dwelling.

Second, it cannot easily be determined from the record whether the requested variance was "substantial", especially because the evidence presented did not show that other variances had been granted to allow the construction of multi-family dwellings on lots having less than one hundred feet of frontage. In any event the available evid-

ence does not indicate that the Duncans were treated differently than any other applicant seeking a variance from the frontage requirements for multi-family dwellings.

Third, the record supports the board's finding that the variance would alter the essential nature of the neighborhood. Although there was some conflict as to what area constituted the Duncans' neighborhood, it is clear that the properties immediately surrounding the Duncans' property consist mainly of one- and two-family dwellings. Adjoining property owners testified before the board in this case and in several hearings on previous variance applications that had been filed by the Duncans.[2] These adjoining property owners uniformly opposed the requested variances on the grounds that their properties would be detrimentally affected by the proximity of the proposed multi-family dwellings to their own dwellings.

Fourth, as discussed above, the Duncans' predicament could have been obviated through

the construction of duplexes rather than multi-family dwellings. The construction of duplexes on the Duncans' lot would not have required a variance from the applicable frontage requirements in the village zoning ordinances.

Based on all the foregoing, it is apparent that the Duncans failed to demonstrate practical difficulties in the use of their property. Although "neighborhood considerations are not as strong" in this case as they would be in an application for a use variance, the Duncans have not offered evidence to show that the "spirit" of the zoning ordinance in question is other than to allow multi-family dwellings only on the few, select lots that conform to frontage requirements. Additionally, the Duncans were not deprived of the beneficial use of their lot. They were prevented only from using their lot in a manner that would provide them with the <u>greatest possible</u> benefit.

Substantial justice requires that the interests of the community, neighborhood and adjoining property owners be given due consideration in this case. The record reveals that the interests of these groups would not be served by approval of the requested variance; and, denial of the variance did not deprive the Duncans of a reasonable return or beneficial use of their property.[3] A preponderance of reliable, probative and substantial evidence supports the board's denial of the requested variance. The judgment of the court of appeals must therefore be reversed.

Judgement reversed.

CELEBREZZE, C.J., HOLMES and DOUGLAS, JJ. concur.

LOCHER and WRIGHT, JJ., concur in judgement only.

C. BROWN, J., dissents.

CLIFFORD F. BROWN, J., dissenting. Although I agree that the appropriate standard for determining area variances is "practical difficulty," as we held in Kisil v. Sandusky (1984), 12 Ohio St. 3d 30, I must

dissent from the result reached in the case at bar.

Middlefield Ordinance 1133.06, the basis upon which the Duncans' application for an area variance was denied, requires by its terms a proof of "unnecessary hardship" as a precondition to the grant of a variance. The court of appeals correctly held that as to "area" variances, the "unnecessary hardship" standard was impermissibly used. Rather, as this court stated in Kisil, supra, at 35, "the standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use. An application for an area variance need not establish unnecessary hardship. It is sufficient the application show practical difficulties."

However, I cannot support the majority's position that the Duncans "did not suffer 'practical difficulties' as a result of the restriction," that "construction of an eight-unit dwelling on the Duncans' lot would 'alter

the essential nature of the neighborhood,'" and that the record reveals "that community interests outweigh the competing interests of the Duncans in this case."

Although the fulcrum of this court's decision is a newly announced series of some seven factors to be weighed, in my view a careful consideration of those factors supports the Duncans' application. The sole testimony offered in support of the resolution denying the application belies the basis for its denial. As to the effect on the "essential character of the neighborhood," zoning board of appeals chairman Dave Adams stated that although there were "minute differences in the footage on the properties" and there were "very few properties in that neighborhood that are wide enough to have multi-family dwellings," he conceded "(t)here are instances where there are multi-family dwellings," just "not to the quantity" that the Duncans sought to construct.

Adams also testified to his opinion that the proposed construction would be "detrimental to public welfare," thus failing to satisfy another ordinance criterion. On that issue, Adams spoke of his concern that the windows in the proposed dwelling would face windows of existing structures, and "(d)epending upon the nature of those persons renting those properties, being at the back of those houses, I just felt that it really wasn't good for the neighborhood ***." Of course, the "nature" of the potential tenants is an impermissible basis upon which to determine requests for area variances. Thus, the flimsy community interests expressed are outweighed by the competing interests of the Duncans. The majority's speculation that the Duncans could have "received a reasonable return" either by construction of additional duplexes or of a four-unit dwelling enjoys no evidentiary support.

The principle of our enlightened, 1984

zoning decision in Kisil, by which we put life into the strict letter of zoning law provisions relating to area variances, has not been overruled by our decision today. It is still good law, as the majority clearly notes. However, in my view, the court of appeals carefully applied Kisil, and in reaching its result, correctly held that "(a)pplying the requirement of an unnecessary hardship finding to a request for an area variance constitutes error since unnecessary hardship is not the proper standard in ruling on 'area' variance requests."

In essence, the application of the majority's seven-factor practical difficulties test to the Duncans' application compels a conclusion based on reasonableness and justice, the bottom line in any case, that the court of appeals be affirmed and that appellees be granted the slight area variance that they seek. Indeed, the majority's application of those seven factors against

appellees on this case reveals that the practical difficulties test has been rendered so spongy and flexible as to validate any arbitrary and capricious restriction on use of property that may be desired.

Accordingly, I would affirm the judgment of the court of appeals.

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[1]In 1979, the board denied an application for a variance that would have allowed the construction of two additional duplexes on the Duncans' lot. This decision was upheld on appeal by the Geauga County Court of Common Pleas after it found that the applicant had not complied with minimum floor requirements.

In April 1980, the board granted a variance authorizing the construction of a four-unit addition to the existing dwelling. This variance was granted on the conditions that:

"1. The recreation area as shown on Exhibit 'A' shall be maintained by the owner for the use of the occupants of the units in said multi-family structure;

"2. The owner shall provide and maintain an access through the fence between the recreational area and the parking area at space No. 8 on said Exhibit 'A'.

"3. The owner shall erect and maintain a five (5) foot high chain link fence paralleling the south property line starting at the front set back line of the existing duplex and shall extend west 420 feet from the west margin of South State Avenue.

"4. The parking area and drives shall meet the requirements of Chapter 1157 of said Codified Ordinances including, but not limited to the requirements

of hard-surfaced material and two parking spaces per dwelling unit.

"5. Any previous permits issued shall be void."

The Duncans did not appeal from this decision, nor did they proceed with construction of the proposed dwelling.

In December 1980, the Duncans filed applications for variances to allow construction of twelve-and eleven-unit multi-family dwellings. These applications were denied. An appeal by Richard Duncan of the denial of the eleven-unit application was voluntarily dismissed in the court of appeals.

On June 11, 1981, Richard Duncan filed a declaratory judgment action challenging the constitutionality of the frontage requirements of Section 1155.01 of the Codified Ordinances of the village of Middlefield. This action was voluntarily dismissed by Duncan on appeal. On December 23, 1981, the Duncans filed a second declaratory judgment action, which was voluntarily dismissed before trial.

The application for the variance at issue in the instant case was filed on October 15, 1982.

[2]See footnote 1, supra.

[3]Today's decision leaves intact the board's reaffirmation of the April 1980 variance that conditionally authorized construction of a four-unit addition to the existing dwelling. See footnote 1, supra, and accompanying text. The time for proceeding with the construction authorized by the April 1980 variance will begin to run from the date of today's decision.

OPINION OF THE COURT OF APPEALS
OF GEAUGA COUNTY, OHIO

(Filed January 3, 1985)

Case No. 1172

COURT OF APPEALS, ELEVENTH DISTRICT
GEAUGA COUNTY

RICHARD A. DUNCAN
Plaintiffs-Appellants

v.

VILLAGE OF MIDDLEFIELD
Defendant-Appellee

OPINION

COOK, P.J.

Richard A. Duncan has appealed from a judgement of the Geauga County Common Pleas Court affirming a decision of the Middlefield Zoning Board of Appeals denying his request for a variance from a 100 foot frontage requirement for his proposed multi-family dwelling in a R-3 district. The subject property has an 88 foot frontage.

In his "Opinion and Judgment Entry" of March 6, 1983, the common pleas court held that all the conditions set forth in Middle-

field Ordinance 1133.06, including a requirement that an unnecessary hardship must exist as a result of "unique circumstances or conditions or shallowness of lot size or shape or exceptional topographical or other physical conditions generally created by the provisions of the Zoning Ordinance", must be applied to all variance requests "including 'area' variances".

Appellant contends the trial court erred in ruling that the decision of the board of appeals was supported by the preponderance of substantial, reliable, and probative evidence and that the findings required by Middlefield Ordinance 1133.06 are mandatory and apply to all variance requests. Appellant also contends the court erred in denying his motion for findings of fact and conclusions of law.

Turning first to appellant's contention that the court erred in ruling that the findings required by Ordinance 1133.06 are mandatory and apply to all types of variance

requests, the Ohio Supreme Court has, since the date of the judgment being appealed, handed down a pertinent decision, Kisil v. Sandusky (1984), 12 Ohio St. 3d 30.

In Kisil, the court, drawing a distinction between "area" and "use" variances, held:

> "The standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use. An application for an area variance need not establish unnecessary hardship; it is sufficient that the application show practical difficulties."

In the instant cause, appellant sought an "area" variance. The common pleas court affirmed the denial of appellant's variance request because such request did not meet the required findings of Ordinance 1133.06 which includes a finding that any party seeking a variance must suffer an unnecessary hardship as a result of unique physical circumstances, etc.

Applying the requirement of an unnecessary

hardship finding to a request for an area variance constitutes error since unnecessary hardship is not the proper standard in ruling on "area" variance requests.

Appellant's contention as to the court's finding as to the preponderance of evidence is well taken in view of the Kisil ruling. Appellant's contention the court erred in overruling his motion for findings of fact and conclusions of law is without merit since Civ.R.52, "Findings of Fact and Conclusions of Law", applies only to trial courts. In the instant cause, the common pleas court was a reviewing court.

Judgment reversed and cause remanded for further proceedings.

/s/ PRESIDING JUDGE ROBERT E. COOK

DAHLING, J.,

FORD, J., concur.

OPINION AND JUDGEMENT ENTRY
OF THE COURT OF COMMON PLEAS

(Dated February 22, 1984)

Case No 83 M 53

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

RICHARD A. DUNCAN
Plaintiff

v.

VILLAGE OF MIDDLEFIELD
Defendant

OPINION AND JUDGEMENT ENTRY

This matter came on for hearing on January 20, 1984 upon (1) the Appellant's timely appeal on January 18, 1983 from the "denial" of a variance by the Zoning Board of Appeals (ZBA) of the Village of Middlefield (Middlefield), dated January 10, 1983, and pursuant to Revised Code Section 2506.01 et seq.; and (2) Appellee's motion to dismiss.

The court finds the motion to dismiss not well taken. The appellant is not precluded, on these facts, from prosecution of this

appeal by "estoppel" or "administrative res judicata". The 1980 Variance, with conditions, granted to appellant, over date of April 10, 1980, is not relevant to the issue in this appeal.

THE BOARD'S DENIAL OF APPELLANT'S APPLICATION FOR A VARIANCE MUST BE AFFIRMED.

Revised Code 2506.04 authorizes certain action by this court and provides:

> "The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgement of the court may be appealed by any party on questions of law pursuant to sections 2505.01 to 2505.45, inclusive, of the Revised Code."

Revised Code 713.11 is the enabling legislation by which a ZBA is established and functions. It provides:

> "The legislative authority of a municipal corporation may create an

> administrative board to administer the details of the application of the regulations under sections 713.06 to 713.12, inclusive, of the Revised Code, and may delegate to such board, in accordance with general rules and regulations to be set forth in the districting ordinances and regulations, the power to hear and determine appeals from refusal of building permits by building commissioners or other officers, to permit exceptions to and variations from the district regulations in the classes of cases or situations specified in the regulations, and to administer the regulations as specified therein. Such administrative powers and functions may be delegated by the legislative authority to the planning commission or board."

Middlefield Ordinance 1133.06 specifies the ZBA authority in the Village of Middlefield and provides:

(Note; Ordinance 1133.06 is setforth at a later section in this Appendix)

The findings (conditions) in the quoted ordinance are mandatory and apply to all types of variance requests, including "area" variances. Unless the evidence before the ZBA satisfies all the findings required, the variance sought must be denied by the ZBA. Zurow v. Cleveland (1978), 61 O App. 2d 14.

The ZBA has authority to attach conditions to a variance it grants, but not to one it denies. The burden of proving entitlement to a variance is upon the applicant therefor.

Appellant's property is in an R-3 (high density) use district. It's frontage is 88.25 feet. It's present use is two family for which the frontage requirement is 85 feet. Appellant's proposed use is multi-family (10) for which the required frontage is 100 feet. It is the difference of 11.75 feet for which appellant seeks a variance. The ZBA found, among other things, that this variance would alter the essential character of the neighborhood, that it does not represent the minimum variance that will afford relief, and that it does not represent the least modification possible of the regulation in issue. This court finds that these conclusions and therefore the ZBA's denial, are supported by the preponderance of substantial, reliable and probative evidence on the whole record. This court further finds that the

denial of the variance is not unconstitutional, illegal, arbitrary, capricious or unreasonable.

Appellee's findings and arguments regarding estoppel, administrative res judicata and the reaffirmation of the April 10, 1980 variance are rejected as improper foundations for the order in question.

IT IS THEREFORE ORDERED that the ZBA order of January 10, 1983 denying appellant's requested variance be and it is hereby affirmed. IT IS FURTHER ORDERED that Appellee's motion to dismiss appellant's appeal be and it is hereby denied. /s/ H.F. INDERLIED JR., JUDGE

cc. Richard A. Duncan, pro se
Stephen M. O'Bryan, Esq.

RESOLUTION OF THE MIDDLEFIELD
ZONING BOARD OF APPEALS
(January 5, 1983)

WHEREAS, Lorraine Duncan and Richard A. Duncan, as agent and contract-vendee of Lorraine J. Duncan, on October 4, 1982 submitted to this Board an application for a variance from the R-3 100 foot frontage requirement for multi-family development, together with a site plan so as to permit construction of a new eight unit multifamily building behind the existing duplex at 15090 South State Avenue so as to authorize ten

multifamily dwellings on the property; and

WHEREAS, under Section 1133.06 of the Codified Ordinance of the Village of Middlefield, the Board of Zoning Appeals is only authorized to grant variances if all of the following findings are made;

(Note; this ordinance is setforth at a later section of this appendix.)

WHEREAS, in 1979, Richard Duncan, as agent for Lorraine Duncan, sought a variance so as to permit construction of two additional duplexes behind the existing duplex on the property, which variance was denied by this Board and which decision on appeal was upheld by the Geauga County Court of Common Pleas on December 28, 1979 since the applicant had not complied with the minimum floor requirements and

WHEREAS, in 1980, Richard Duncan and Lorraine Duncan again sought a frontage variance so as to add four multifamily units to the existing duplex and after two public hearings, the tapes of which the Board has reviewed, on April 10, 1980 this Board found that the request was not contrary to the public interest and met the criteria of Section 1133.06 of the Codified Ordinances of the Village of Middlefield, provided that certain conditions set forth on the plan and additional conditions agreed to at the hearings by Richard Duncan were met; and

WHEREAS, the conditions of the April 10, 1980 variance granted to the Duncans consisted of the following:

(Note; these conditions are setforth verbatim in the preceeding Ohio Supreme Court Opinion at Footnote 1.)

WHEREAS, in granting the April 10, 1980

variance this Board found that the variance was necessary to allow reasonable use of the property, would not alter the essential character of the neighborhood, was the minimum variance that would afford relief and was the least modification possible of the regulation in issue; and

WHEREAS, Richard Duncan and/or Lorraine Duncan did not commence and have not to date commenced alterations of the subject property in accordance with the terms of the April 10, 1980 variance nor have they appealed same; and

WHEREAS, on December 9, 1980 Richard and Lorraine Duncan submitted an application so as to allow two multifamily buildings to house twelve families, which application was denied for failure to meet the minimum frontage, minimum square footage per family and parking requirements; and

WHEREAS, on December 20, 1980 Richard Duncan and Lorraine Duncan submitted an application so as to allow two multifamily buildings to house eleven families, which variance was denied by this Board on March 12, 1981 following two public hearings, this Board finding that Ordinance 1133.06 has not been met and that the request contradicted the April 10, 1980 variance and the Duncans are estopped to contradict same; and

WHEREAS, on March 19, 1980, Richard Duncan filed an administrative appeal from this Board's March 12, 1981 decision (Geauga County C. P. Case No. 81-M-265), and on June 11, 1981 filed a declaratory judgment action (Geauga County C. P. Case No. 81-M-547) attacking the constitutionality of the frontage requirements of Ordinance 1155.01; and

WHEREAS, Case No. 81-M-547 was dismissed since all issues in the declaratory judgment action could be raised in the administrative appeal and Case No. 81-M-265 was dismissed at trial as Richard Duncan was not a party adversely affected by the decision of this Board; and

WHEREAS, Richard Duncan appealed the dismissal in both Case Nos. 81-M-265 and 81-M-547 to the Court of Appeals (Cases Nos. C.A. 997 and 991) and then voluntarily dismissed both of the appeals effective December 22, 1981; and

WHEREAS, on December 23, 1981, Richard Duncan, as contract-vendee, filed a second declaratory judgment action against the Village attacking the constitutionality of Ordinance 1155.01 vis-a-vis his eleven multifamily unit proposal (Geauga County C. P. Case No. 81-M-1129) and on January 6, 1982, Lorraine Duncan, as owner of subject property, was added as a plaintiff; and

WHEREAS, Richard and Lorraine Duncan thereafter voluntarily dismissed Case No. 81-M-1129 the week of the scheduled September 16, 1982 trial, and two weeks before submitting to the Village the October 4, 1982 application, which is the subject of this appeal, which requests a frontage variance so as to allow construction of ten multifamily units on the property, and

WHEREAS, public hearings were held by this Board on December 1 and December 15, 1982 respecting Richard Duncan and Lorraine Duncan's present application for a frontage variance to allow ten multifamily units on the property; and

WHEREAS, no evidence was presented by the applicants demonstrating conditions to which said property is subject which were not

present when this Board granted the April 10, 1980 variance or when this Board on March 12, 1981 denied a similar request for a frontage variance respecting the same property;

NOW, THEREFORE, this Board of Zoning Appeals, having considered all the evidence, testimony, its prior minutes, the tapes of the meetings preceding the April 10, 1980 variance, and all records, finds as follows:

1. The requested variance for ten multi-family units is not necessary to enable a reasonable use of the property which was allowed for by the April 10, 1980 variance that, if the present request were authorized, it would alter the essential nature of the neighborhood, be detrimental to the public welfare, not represent the minimum variance that would afford relief or the least modification possible so as to provide a reasonable use and therefore is not authorized under Ordinance 1133.06.

2. This latest request for a variance is in direct contravention of the April 10, 1980 variance, conditions of which were solicited and/or agreed to by the applicants.

3. The applicants are estopped to question the April 10, 1980 variance granted by this Board.

4. The applicants are barred by administrative res judicata from challenging the granting of the April 10, 1980 variance or the denial of the March 12, 1981 variance, since there has been no change of any material circumstance regarding the surroundings since 1980, and the present request does not substantially or materially differ from the March 1981 request, but for the reduction from 11 to 10 units.

5. The addition of four units to the existing duplex, as authorized and conditioned in the April 10, 1980 variance represents the minimum variance that will afford relief and the least modification possible of the terms of the zoning ordinance so as to afford a reasonable use of the property.

6. The applicants' October 4, 1982 request for a variance so as to authorize the construction of ten multifamily units is consequently hereby denied.

7. The applicants' April 10, 1980 variance, subject to the conditions contained therein, is hereby reaffirmed.

JUDGEMENT ENTRY OF THE
SUPREME COURT OF OHIO
(April 11, 1986)

Case No. 85-350

THE SUPREME COURT OF OHIO
Columbus

RICHARD A. DUNCAN et. al.,
Appellees

v.

VILLAGE OF MIDDLEFIELD,
Appellant

JUDGEMENT ENTRY

This cause, here on appeal from the Court of Appeals for Geauga County, was considered

in the manner prescribed by law. On consideration thereof, judgment of the Court of Appeals is reversed for the reasons set forth in the opinion rendered herein.

It is further ordered that the appellant recover from the appellees its costs herein expended; and that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Court of Appeals for Geauga County for entry.

/s/ FRANK D. CELEBREEZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date _____.

JAMES WM. KELLY _____ CLERK

/s/ DANIEL J. CROWLEY _____ DEPUTY

REHEARING ENTRY OF THE
SUPREME COURT OF OHIO

(July 16, 1986)

Case No. 85-350

THE SUPREME COURT OF OHIO
Columbus

RICHARD A. DUNCAN et al.,
Appellees

v.

VILLAGE OF MIDDLEFIELD,
Appellant

REHEARING ENTRY

It is ordered by the Court that rehearing in this case be, and the same is hereby denied.

/s/ FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 16th day of July, 1986.

JAMES WM. KELLY CLERK
/s/ DANIEL J. CROWLEY DEPUTY

MIDDLEFIELD ORDINANCE 1133.06

(a) The Board of Zoning Appeals shall have the power to hear and decide appeals and authorize such variances from the provisions or requirements of the Zoning Ordinance as will not be contrary to the public interest. In authorizing a variance, the Board may attach conditions and require such guarantee or bond as it may deem necessary to assure compliance with the objectives of the Zoning Ordinance. On appeal where there is unnecessary hardship the Board may grant a variance in the application of the provision of the Zoning Ordinance only if all of the following findings are made:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions generally created by the provisions of the Zoning Ordinance in the neighborhood or district in which the property is located.

(2) That because of such physical circumstances or conditions, there is not possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant.

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent

property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

(b) The Board shall have the authority to grant an extension or permit completion of a building devoted to a nonconforming use upon a lot occupied by such building, or on a lot adjoining, provided that such lot was under the same ownership as the lot in question on the date such building became nonconforming, and where such extension is necessary and incidental to the existing use of such building; provided, however, that the floor areas of such extension shall not exceed in all, ten percent of the floor area of the existing building or buildings devoted to a nonconforming use.

OPINION OF KISIL V. SANDUSKY
Supreme Court Of Ohio

KISIL, Appellant

v.

CITY OF SANDUSKY ET AL., Appellees

(Cite as Kisil v. Sandusky (1984), 12 Ohio St. 3d 30.)

The standard for granting a variance which relates solely to area requirements should be a lesser standard than that ap-

plied to variances which relate to use. An application for an area variance need not establish unnecessary hardship; it is sufficient that the application show practical difficulties.

(No. 83-1449- Decided July 3, 1984.)

Appeal from the Court of Appeals for Erie County.

In the fall of 1981, plaintiff-appellant, Michael Kisil, purchased a single-family residence located at 508 Huron Avenue, Sandusky, Ohio. The zoning classification for the neighborhood, in which plaintiff's property is located, is R2F, residential two-family. In December 1981, plaintiff requested the approval of the city planning commission to convert the residence situated at 508 Huron to a duplex. The request was denied by the commission on January 13, 1982. The reason for the denial of plaintiff's request was that the lot on which the residence was located was insufficient in size to

maintain a duplex, pursuant to Section 151.21 of the Sandusky Code of Ordinances. Section 151.21 requires that the minimum lot size for a two-family dwelling in R2F district is 2,750 square feet per unit or a total of 5,500 square feet. The plaintiff's property is only 2,100 square feet. The plaintiff further admitted to the commission that he knew, at the time of purchase, that the previous owner's request to convert the property to a multifamily residential use had been denied. The decision of the commission was affirmed on appeal by the Sandusky Zoning Code Board of Appeals on February 25, 1982.

On March 3, 1982, plaintiff filed a notice of appeal to the Court of Common Pleas of Erie County pursuant to R.C. Chapter 2506. He sought a reversal of the decision of the board as unreasonable, arbitrary and capricious. In his amended notice of appeal plaintiff further sought declaratory relief finding the enforcement of the minimum lot

size requirement contained in Section 151.21 as unconstitutional, in that it violates the equal protection provisions of the United States Constitution and the Ohio Constitution. The trial court reversed the decision of the board, finding the denial of a variance to be unreasonable and arbitrary in view of a variance granted to a neighboring property owner and the entire character of the neighborhood. The court dismissed the request of plaintiff for declaratory judgment, finding the administrative appeal effectual to afford the relief plaintiff sought.

The defendants-appellees appealed the decision of the trial court. The appellate court reversed the trial court finding the substantial variance between plaintiff's lot size and the minimum requirement contained in Section 151.21, coupled with plaintiff's prior knowledge of the commission's denial of a similar request by the previous landowner, did not support a finding that the

action of the board was unreasonable or discriminatory.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Murray & Murray Co., L.P.A., and Mr. William H. Bartle, for appellant.
Smith & Leher Co., L.P.A., and Mr. William H. Smith, Jr., for appellees.

CLIFFORD F. BROWN, J.

I

The parcel of land located at 508 Huron Avenue, Sandusky, Ohio, is a single-family residence which was erected before the 1956 enactment of the Sandusky city zoning ordinances. The area in which the property is situated was designated R2F by the 1956 ordinance. R2F zoning allows two-family dwellings and single-family dwellings. When plaintiff-appellant purchased the property in question in 1981, he did so for investment purposes with the idea of renting the residence. Appellant testified before the commission and board that he desired to convert the

residence from a single-family to a two-family residence so as to make the rental property profitable.

The conversion of appellant's property to a duplex would not need the approval of the commission but for the fact that the lot on which the residence is situated is below the minimum area and yard requirements contained in the city zoning provisions.[1] (Note; footnote omitted herein, as not relevant) Appellant, therefore, sought a variance to allow the conversion of the residence. Such a variance is not a pure use variance. The variance sought by appellant is merely an area variance. It has been noted by other jurisdictions that the standard for granting a variance which relates to area requirements only should be a lesser standard that that applied to use variances.

The New York Court of Appeals when faced with a case quite similar to the present action explained, "(a)n applicant for an area

variance need not establish special (unnecessary) hardship. It is sufficient to show practical difficulties * * *." Matter of Hoffman v. Harris (1966), 17 N.Y. 2d 138, 144, 269 N.Y. Supp. 2d 119, 123, 216 N.E. 2d 326.[2] (Note; footnote omitted herein, as not relevant) The court went on to cite the reason for such distinctions between use and area variances as being, "* * * (w)hen the variance is one of area only, there is no change in the character of the zoned district and the neighborhood considerations are not as strong as in a use variance." Id.

In this case the grant of a variance to appellant will not alter the character of the surrounding neighborhood. The record reveals that a vast majority of the surrounding neighborhood is at the present time being used as two-family residential rental property. In fact the lot directly north of appellant's property was granted a variance by the commission to be used as a multifamily residence, which is not only an area but a use

variance. The residence granted this variance is on a lot which is smaller in area than the appellant's lot.

(Note; the following (2) two paragraphs in regards to applicants purchase of the property with knowledge of the restriction omitted herein, as not relevant)

We are further persuaded that the common pleas court was correct when it found that the denial of the variance by the commission and board was unreasonable and arbitrary. An examination of the record reveals that the neighborhood in which appellant's parcel of land is situated contains many duplex residences.[3] (Note; footnote omitted herein, as not relevant) A significant number of these residences are on lots insufficient in size, according to the zoning ordinances. Even more persuasive is the fact that the lot north of appellant's lot was recently granted a variance for a multifamily residence. The allowance of other duplexes on lots

insufficient in size and the granting of a multifamily variance to a neighboring landowner, while denying appellant's request for a variance, is unreasonable and arbitrary enforcement of the zoning ordinances.

(Note; Section II of opinion omitted herein, as not relevant).

Since the standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use, an application for an area variance need not establish unnecessary hardship. It is sufficient the application show practical difficulties. Having examined the record, this court concludes that the court of common pleas did not abuse its discretion in reaching its judgment. The judgment of the court of appeals is therefore reversed.

Judgment reversed.

W. BROWN, SWEENEY and J.P. CELEBREZZE, JJ., concur.

CELEBREZZE, C.J., LOCHER and HOLMES, JJ., dissent. (Note; dissent omitted herein).

(2)

Supreme Court, U.S.
FILED
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No. 86-545

In the Supreme Court of the United States

October Term, 1986

RICHARD A. DUNCAN, *et al.*,
Petitioners,

vs.

VILLAGE OF MIDDLEFIELD, OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MEMORANDUM OPPOSING CERTIORARI

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MEMORANDUM OPPOSING CERTIORARI

This case arose as an appeal from Respondent's administrative denial of a variance which Petitioners requested to allow them to construct an eight-unit, multi-family dwelling behind their existing duplex dwelling.

Throughout this case, Petitioners have challenged the variance denial solely on state law grounds. Indeed, Petitioners' first mention of *any* federally based claim appeared only as a passing reference in their motion for rehearing, filed in the Ohio Supreme Court subsequent to that Court's decision denying Petitioners relief. Petitioners raised no federal issues either in the Court of Appeals (*See* Court of Appeals Assignments of Error at A-1) or in the Ohio Supreme Court (*See* Supreme Court Propositions of Law at A-3). Indeed, Petitioners admit that the first time they have raised federal issues is at this stage of the proceedings. Petition at 10.

This Court has consistently held that the failure to raise a federal question until after the highest state court has ruled on the merits renders the claim jurisdictionally deficient. *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958).* Moreover, the land use issues argued in the Certiorari Petition do not raise a substantial federal question. Consequently, the Petition for Certiorari should be dismissed.

Petitioners' Petition for Certiorari is defective for a second reason. The Ohio Supreme Court rendered its opinion on April 11, 1986. Under Rule IX, Section 1 of the Ohio Supreme Court Rules of Practice (A-5), Petitioners were required to file their motion for rehearing within 10 days of the decision, *i.e.* by April 21, 1986. No such motion was filed within that time.

Instead, on June 10, 1986, Petitioners filed a motion for leave to file a proposed motion for reconsideration, along with the motion for reconsideration. Contrary to the Petitioners' claims (Petition at 2), the Ohio Supreme Court never ruled on the motion for leave, and instead, summarily denied the motion for reconsideration. *See* Denial of Reconsideration at A-6. Thus, because there was no ruling below granting Petitioners leave to file, nearly two months out-of-rule, the motion for rehearing, the Petition for Certiorari, filed more than five months after the Ohio Supreme Court's final decision, was not filed within the jurisdictionally required time limitation. *See Pfister v. Northern Illinois Finance Corp.,* 317 U.S. 144, 150 (1942); *Bowman v. Loperena,* 311 U.S. 262, 266 (1940).

**See also Beck v. Washington,* 369 U.S. 541, 552-53; *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.,* 228 U.S. 326, 333-34 (1913); *Forbes v. State Council,* 216 U.S. 396, 399 (1910).

Accordingly, because Petitioners did not raise their federal claims in the proceedings below, and because their Petition for Certiorari was not timely filed, there is no reason for the Court to grant Certiorari in this case. Consequently, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

PETITIONERS' COURT OF APPEALS ASSIGNMENTS OF ERROR

First Assignment of Error

The trial court erred to the prejudice of the Appellants in his judgment ruling that the Zoning Board of Appeals conclusions and denial was supported by the preponderance of substantial, reliable and probative evidence.

Issues Presented for Review and Argument

1. It was against the manifest weight of the evidence for the Court to rule that the variance would alter the essential character of the neighborhood. (Finding 4 of Ordinance 1133.06 was not met).

2. It was against the manifest weight of the evidence for the Court to rule that the variance would not represent the minimum variance that will afford relief and that it does not represent the least modification possible of the regulation in issue. (Finding 5 of Ordinance 1133.06 was not met).

Second Assignment of Error

The trial court erred to the prejudice of the Appellants in his judgment ruling that the findings (conditions) of Middlefield Ordinance 1133.06 are mandatory and apply to all types of variance requests, including "area" variances.

Issues Presented for Review and Argument

1. The trial courts ruling was contrary to law in that the Appellants "area variance" is subject to lesser restrictions in that; it need not establish special hardship or uniqueness, the self-imposed hardship rule does not apply and it need not establish financial hardship.

2. The trial courts ruling was contrary to law in that to grant the Appellants "area variance" only one major requirement is necessary to be met; the evidence must indicate that the hardship on the owner if denied the variance must outweigh the community detriment if granted.

Third Assignment of Error

The trial court erred to the prejudice of the Appellants in his judgment ruling denying the Appellants motion for findings of separate conclusions of fact and law.

Issue Presented for Review and Argument

The trial courts ruling was contrary to law in that Civil Rule 52 has application to the instant case.

PETITIONERS' PROPOSITIONS OF LAW IN OHIO SUPREME COURT

Proposition of Law No. 1

A Court of Appeals Decision cannot be reversed based on a contention that an applicant is not entitled to a variance request because it would alter the character of the neighborhood and would not represent the minimum variance, when it is supported by insufficient reasoning.

Proposition of Law No. 2

A Court of Appeals Decision cannot be reversed based on a contention that an applicant is not entitled to a variance request because they have not shown a sufficient financial hardship under the practical difficulties test, when it is supported by insufficient reasoning.

Proposition of Law No. 3

A Court of Appeals Decision cannot be reversed based on a contention that an applicant is not entitled to a variance request because such request is for a non-allowable use variance, when it is supported by insufficient reasoning.

Proposition of Law No. 4

A Court of Appeals Decision must be affirmed reversing a Common Pleas Court ruling which upheld a denial of a variance by a Zoning Board of Appeals, where such Board erroneously applied "unnecessary hardship" standards of a zoning ordinance to an area variance review and solely denied such variance based upon such standards.

Proposition of Law No. 5

A Court of Appeals Decision must be affirmed reversing a Common Pleas Court ruling which upheld a denial of a variance by a Zoning Board of Appeals, where the facts or evidence in the Record before the Zoning Board of Appeals clearly indicate that: the Courts stated findings are unsupported by sufficient evidence (a preponderance of substantial, reliable and probative evidence on the whole record) and that, under the applicable well-established law of the practical difficulty test, each and every one of the factors or considerations of such test have been favorably satisfied toward establishing or demonstrating a practical difficulty, therefore justifying the granting of the variance.

RULES OF PRACTICE

RULE IX. MOTIONS FOR REHEARING AND ISSUANCE OF MANDATE

Section 1. Motion for Rehearing

A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

Section 2. Issuance of Mandate

Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing. No mandate shall issue on denial of a motion to certify or a motion for leave to appeal, or upon the sustaining of a motion to dismiss an appeal as one not involving a substantial constitutional question.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated July 16, 1986)

Case. No. 85-350

THE SUPREME COURT OF OHIO
COLUMBUS

RICHARD A. DUNCAN, *et al.*,
Appellees,

v.

VILLAGE OF MIDDLEFIELD,
Appellant.

REHEARING ENTRY
(Geauga County)

It is ordered by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ FRANK D. CELEBREZZE
Chief Justice

NO. 86-545

Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD A. DUNCAN, ET AL,

PETITIONERS

VS.

VILLAGE OF MIDDLEFIELD, OHIO

RESPONDENT

REPLY BRIEF

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

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NO. 86-545

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RICHARD A. DUNCAN, ET. AL.

Petitioners

vs.

VILLAGE OF MIDDLEFIELD, OHIO

Respondent

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

REPLY BRIEF

The Respondent, Village of Middlefield, Ohio, setsforth in its Memorandum Opposing Certiorari two points as to why this Court should not grant Certiorari in this case. For the reasons as discussed below, such points have no merit.

First of all, the Petitioners' (the Duncans) major federal question raised or setup here in this Court (due process) appears

consistently in the record of this case. The major question to be determined throughout this case was whether the Middlefield Zoning Board of Appeals' decision of denying a variance was "unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record." (see; the Common Pleas Court ruling at page A-27 and A-28 of the Petition; the Court of Appeals ruling at page A-23 of the Petition; the Ohio Supreme Courts ruling at page A-13 of the Petition.)

It needs no elaboration that any governmental decision (and a Courts affirmation of such decision) which is arbitrary and unsupported by a required degree of evidence clearly represents a "purposeless restraint" and violates constitutional guaranteed due process. Consequently, because at every stage of these judicial proceedings the Duncans have alleged and argued that such Board of Appeals decision was arbitrary and

unsupported by the preponderance of reliable, probative and substantial evidence, it is therefore clear that such federal claims have been raised in the Duncans arguments in the Courts below (see; First Assignment of Error at page A-1 of Memorandum Opposing Certiorari and Proposition of Law No. 5 at page A-4 of Memorandum Opposing Certiorari).

Furthermore, it is clear that the Duncans discrimination claim based on the XIV amendment of the Constitution raised here could not have been raised in the state courts because it is specifically directed at the final ruling of the Ohio Supreme Court. (similarly, the Duncans' due process claim against the Ohio Supreme Courts ruling could not have been raised prior to their decision).

Consequently, it is clear that the Duncans have committed no errors in failing to timely raise federal claims.

Even assuming that this Court finds that the federal questions were not timely and

properly raised before the state courts, it is obvious that justice cannot allow this Court to permit such to act as a bar to accepting jurisdiction of this case due to the improper procedures and errors as committed by the zoning board and the lower state courts (failing to properly apply the "practical difficulty test") which has resulted in, as of this time, depriving the Duncans of even an appellate review of the merits of their case (see; page 3-13 of Petition, which explains how the Duncans finally convinced the courts of Ohio at the highest level, of the proper body of law to apply and how to apply its principles). The Duncans now merely request a judicial review of such decision, which will clearly reveal the flagrant errors of the Ohio Supreme Court, in particular the Courts giving effect to private biases ("unsubstantiated viewpoints of neighbors") as setforth recently by this Court in Cleburne v. Cleburne Living Center (NO. 84-468). See Petition at pages 17-18.

Secondly, the time requirements for filing the Duncans' petition were clearly satisfied. When the Duncans received by U.S. mail the order of the Ohio Supreme Court denying rehearing (see A-35 of Petition) on approximately July 18, 1986, I telephoned this Court and spoke to Edward L. Turner, Assistant Clerk, and asked him whether this ruling would extend the time for filing the petition until October 16, 1986 (90 days from the July 16th, 1986 entry date). He informed me to check with the Ohio Supreme Court to see if the Motion for Leave to file was granted.

I called such court and spoke to Adrian Redd (614-466-3456) and he informed me, after checking with his superior, that the court "obviously accepted the motion for leave to file such out of time as they made a ruling on the rehearing."

At 2:00 P.M. that day, I again called Mr. Turner in regards to talking to the clerk at the Ohio Supreme Court and he stated that

"its good enough for us" and that we would have 90 days from July 16, 1986 to send in our Petition. It is undisputed that such Petition was filed with this Court well before October 16, 1986, and is thus timely.

In summation, it is clear that the respondents two points are not well-taken.

Respectfully submitted,

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